UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

T.M.S. MANAGEMENT CO.

and **Case No. 2-CA-36640-1**

JOSE ROJAS, An Individual

***Joane Si Ian Wong, Esq.*, for the General Counsel**
Stephen I. Wohlberg, Esq. (Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C.),
of Yonkers, New York, for the Respondent

DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in New York, New York, on April 12, 2005. The Complaint alleges that Respondent, in violation of Section 8 (a) (1) of the Act, discharged Jose Rojas for engaging in protected concerted activities. Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by Counsel for the General Counsel on May 16, 2005, I make the following

Findings of Fact

I. Jurisdiction

At all material times Respondent, a domestic corporation with an office and place of business located at 1466 St. Peters Ave., Bronx, New York, has been engaged in the business of managing residential apartment buildings including a building located at 330 East 43rd Street, New York, New York. Respondent annually derives gross revenues in excess of $500,000 and purchases electricity valued in excess of $50,000 from Con Edison, an enterprise directly engaged in interstate commerce. It is undisputed, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts

It is undisputed that Vito Sacchetti is the sole owner of Respondent and that he is a supervisor within the meaning of Section 2 (11) of the Act and an agent acting on behalf of Respondent.

Five doormen were employed at the building at 330 East 43rd Street during the time material to the instant case. From Monday through Friday, Jose Rojas, Rojas' son Arsenio Garcia and Tony Bolga each worked an eight hour shift every day. On the weekend, Jerry Vacca and his cousin covered the shifts. A superintendent named Rafael Verdugo lived in the building.

Rojas began working at the building in 1994. Rojas was to start his three week vacation after completing work on August 20 2004. That day, Rojas received his paycheck and his vacation check. During the first week of Rojas' vacation Garcia called him from work and complained of ulcer pains. Rojas advised him to go to the hospital. The next day, Garcia was home from the hospital and Rojas observed him calling Respondent's office. Garcia then told Rojas that he was summoned to Respondent's office. Sometime later Garcia, who had left home to travel to the office, telephoned Rojas and said he had been fired. Rojas told Garcia, "Take it easy. Hang up. I'm going to call Vito."[1]

Rojas testified that he telephoned Sacchetti and said, "I'm calling for Arsenio. I don't think that's fair, he just told me that you fired him." According to Rojas, Sacchetti replied, "Don't butt in, because the same thing could happen to you." After saying this, Sacchetti hung up. After a few minutes Rojas made a second telephone call to Respondent's office and was told by the secretary that Sacchetti had just left. Rojas did not telephone Sacchetti thereafter. Rojas stated that he did not tell Sacchetti that he must rehire Garcia and he did not say that he would not return to work if Respondent did not rehire Garcia.

A few days before Rojas was to return to work upon completion of his vacation, Rojas received a letter from Respondent signed by Sacchetti. The letter, dated September 2, 2004, stated the following:

> Please be advised that based on you and you son's improper behavior, I have no other alternative than to terminate your employment with this company immediately.

Vito Sacchetti testified that Rojas is a "very good guy" who had worked for him for eight years. In contrast, Sacchetti stated, Garcia was not a good employee.[2]

Sacchetti provided the Regional Office with an affidavit dated December 2, 2004, prepared with the assistance of his attorney. The affidavit states, in relevant part:

> As more fully set forth below, Mr. Jose Rojas was not fired; he quit.
> In August, 2004, Mr. Arsenio Garcia was fired for cause.
> Thereafter, his father, Mr. Jose Rojas called me and said he was quitting, and would only return to work if his son was rehired.
> Mr. Jose Rojas threatened to make trouble for me if I did not rehire his son.
> I did not rehire his son, and Mr. Jose Rojas did not return to work.
> The instant action is nothing more than Mr. Jose Rojas making good on his threat to make trouble for me if I did not rehire his son.

[1] The record does not establish the precise date of these events. Rojas testified that Garcia was probably fired on August 24, 2004.

[2] Sacchetti testified to a number of incidents with respect to Garcia. I note that Garcia's discharge is not at issue herein and that some of the incidents cited by Sacchetti had not actually been witnessed by Sacchetti.

Sacchetti's testimony on direct examination was not the same as his affidavit given less than four months after the events at issue. Sacchetti testified that after he fired Garcia he spoke to Rojas who said, "You fired my son, I'm leaving, I'm quitting. Because if I'm there you're going to have a lot of trouble with the building." On direct examination by Counsel for Respondent when Sacchetti was asked whether he said "don't butt in because the same could happen to you", he at first replied, "not really, never." But then Sacchetti changed his testimony and acknowledged that he did tell Rojas not to butt in because the same could happen to him. Sacchetti stated that he meant that Rojas should not "cover up his son and damage his job." Sacchetti added that Rojas had said, "When I did the doorman you're going to have a lot of trouble into the building from my son." (sic)

When asked a third time on direct examination whether he warned Rojas not to butt in because the same could happen to him Sacchetti said he could not recall. When asked again about this comment, Sacchetti stated that he did tell Rojas not to butt in or the same would happen to him and this was said before Rojas made any threats.

Sacchetti testified that Rojas telephoned him repeatedly after the first conversation. He claimed that Rojas was asking for his job back and threatening him.

On cross examination, Sacchetti at first denied he told Rojas not to butt in or the same would happen to him and then Sacchetti said he could not recall.

B. Discussion and Conclusions

I note that Sacchetti's affidavit given less than four months after the events in question took place refers to only one conversation with Rojas. Further, Rojas testified that he spoke to Sacchetti only once after Garcia was fired. I credit Rojas that he had one telephone conversation with Sacchetti following Garcia's discharge.

It is evident that Sacchetti's various versions of the conversation with Rojas were inconsistent and shifting. Sacchetti kept changing his mind about whether he told Rojas not to butt in or the same could happen to him. Sacchetti's affidavit, given with the assistance of his attorney soon after the events in question, states that Rojas said he would quit unless his son were rehired and that Rojas threatened to make trouble. Sacchetti's affidavit concluded that the "trouble" amounted to the bringing of the unfair labor practice proceeding. By the time of the instant hearing, in contrast, Sacchetti quoted Rojas as threatening to make trouble in the building. Sacchetti ended up testifying to two inconsistent scenarios: in one version the reason Rojas gave for quitting his job was that if he were there Sacchetti would have trouble in the building and in the other version Rojas repeatedly asked for his job back and threatened Sacchetti. Further, Sacchetti did not explain why, if Rojas had quit his job in late August, Respondent fired him in writing on September 2 based on "improper behavior" by both Rojas and Garcia. The letter of discharge does not refer to Rojas' purported quit of the week before.

Because of the inconsistencies and contradictions in Sacchetti's testimony and because his testimony does not comport with the documentary evidence I have decided not to credit his testimony. Instead, I shall rely on the testimony of Rojas.

I find that Garcia informed Rojas that he had been discharged and that Rojas told Garcia to take it easy while he spoke to Sacchetti about the matter. Rojas telephoned Sacchetti immediately thereafter in an attempt to get the discharge reversed. Rojas told Sacchetti that he was calling for Garcia and that he did not think the discharge of Garcia was fair. Sacchetti replied that Rojas should not butt in because the same thing could happen to him. Before Rojas

could continue his attempt to change Sacchetti's mind, Sacchetti hung up. I find that during this conversation Rojas did not quit his job and he did not tell Sacchetti that he would not return to work unless Garcia were rehired. On September 2, 2004, Respondent sent the letter discharging Rojas.

Sacchetti testified that Rojas is a "very good guy." The only reason apparent on the record for discharging Rojas was the reason given by Sacchetti when Rojas questioned the fairness of Garcia's discharge. It is clear from Sacchetti's testimony that he knew Rojas' purpose in telephoning was to convince Sacchetti to reverse his "unfair" decision to fire Garcia. Sacchetti made it clear that if Rojas did "butt in" then the "same" would happen to him. Rojas was fired because he dared to butt in and tried to convince Respondent of the unfairness of Garcia's termination.

The Board set forth the definition of concerted activity in *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984); reaffd. in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987):

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8 (a) (1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

Garcia complained to Rojas that he had been fired and Rojas told Garcia to hang on while he took some action designed to rectify the situation, namely telephoning Sacchetti. Thus, Rojas was taking action on behalf of Garcia and with his authority. Rojas then telephoned Sacchetti because Garcia, a fellow employee, had been fired after returning to work from an episode requiring hospitalization. Rojas protested to Sacchetti that the discharge was unfair. Rojas' action in support of another employee constituted concerted activity in that Rojas was trying to change Respondent's action with respect to Garcia. Rojas' action was for the mutual aid and protection of employees; the fairness or lack of fairness of an employer's policies with respect to discharge affects all employees. Sacchetti was well aware of the concerted nature of Rojas' activity; Sacchetti knew Rojas was calling on behalf of Garcia and that the subject at issue was perceived unfairness in discharging an employee. Rojas did nothing to lose the protection of the Act when he called to tell Sacchetti that Garcia's firing was unfair. The record convinces me that Sacchetti's motivation in sending the letter of discharge to Rojas was the fact that Rojas "butted in" by seeking to discuss and change what he saw as an unfair hiring. I find that Respondent discharged Rojas because he engaged in protected concerted activity.[3]

Conclusions of Law

1. By discharging employee Jose Rojas because he engaged in protected concerted activities Respondent violated Section 8 (a) (1) of the Act.

Remedy

[3] The fact that Garcia is Rojas' son has no bearing on the issue because they are fellow employees within the facts of this case. *Woodlawn Cemetery*, 305 NLRB 640, 643 (1991).

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, T.M.S. Management Co., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging any employee for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Jose Rojas full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Jose Rojas whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its facility at 330 East 43rd Street, New York, New York, copies of the attached notice marked "Appendix"[5] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

_____
Eleanor MacDonald
Administrative Law Judge

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jose Rojas full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose Rojas whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Jose Rojas and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

_____
T.M.S. Management Co.

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.